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Constitutional Law—Miranda Means What It Says: Protection against Self-incrimination for the Juvenile Custodial Interogee

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CONSTITUTIONAL LAW—*MIRANDA* MEANS WHAT IT SAYS: PROTECTION AGAINST SELF-INCRIMINATION FOR THE JUVENILE CUSTODIAL INTEROGEE

State v. Tibiatowski, 590 N.W.2d 305 (Minn. 1999)

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> [W]e deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.[1]

I. INTRODUCTION

The privilege against self-incrimination is inscribed in the Fifth

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1. Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (commenting on juvenile interrogations).

Amendment of the United States Constitution[2] and is traceable to some of the earliest laws of civilized man.[3] When the Minnesota Supreme Court decided *State v. Tibiatowski*,[4] it ruled admissible an incriminatory statement obtained from a juvenile who was not informed of this privilege prior to questioning.[5] This note will explore the *Tibiatowski* court's analysis in light of relevant statutes and precedent that the court failed to consider in reaching its decision.

In *Tibiatowski*, the Minnesota Supreme Court failed to consider North Dakota laws controlling North Dakota Department of Corrections Human Relations Counselor Connie Wheeler in her capacity as Jeremy Daniel Tibiatowski's case manager.[6] North Dakota's official policy and the North Dakota Interstate Compact on Juveniles required Wheeler to cooperate fully in sending a delinquent juvenile, such as Tibiatowski, to another state for custody upon the other state's request.[7] When Wheeler questioned Tibiatowski,[8] she knew that Minnesota had requested a hold on him.[9] The Minnesota hold was a restraint in addition to his pre-

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2. U.S. CONST. amend. V reads:

> *No person shall be* held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be *compelled in any criminal case to be witness against himself*, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Id. (emphasis added).

3. *See generally* Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 966-74 (1988) (describing Talmudic law and its foundation).

4. 590 N.W.2d 305 (Minn. 1999).

5. *See id.* at 311.

6. *See id.* at 307 (noting that Wheeler was Tibiatowski's North Dakota Department of Juvenile Services case manager); *see also* N.D. CENT. CODE § 27-21-01 (1991) (stating that the Division of Juvenile Services is created within the Department of Corrections and Rehabilitation and its chief administrative officer is appointed by the director of the Department of Corrections and Rehabilitation); *see id.* at § 27-21-09 (stating that the Division of Juvenile Services is to cooperate with the North Dakota juvenile courts); *see id.* at § 27-22-01 (stating that North Dakota's policy is "to cooperate fully with other states in returning juveniles to such other state whenever their return is sought"); *see id.* at § 27-22-02 (stating that under the Interstate Compact on Juveniles, a delinquent juvenile may be sent to another state for custody upon the other state's request).

7. *See* N.D. CENT. CODE § 27-22-01 to -02 (1991).

8. *See Tibiatowski*, 590 N.W.2d at 307 (stating that Wheeler arranged an interview with Tibiatowski at the Cass County Juvenile Detention Center in Fargo, North Dakota, on February 13, 1996).

9. *See id.* (stating that Wheeler received a message on February 13, 1996,

existing North Dakota incarceration for a prior charge.[10] Due to the additional restraint, Tibiatowski was entitled to a warning from Wheeler concerning his privilege against self-incrimination under the Fifth Amendment of the U.S. Constitution,[11] as interpreted by the U.S. Supreme Court in *Miranda v. Arizona*.[12] Because Wheeler failed to give Tibiatowski a *Miranda* warning,[13] the Minnesota Supreme Court erred in admitting his confession into evidence.

II. HISTORY

Jewish Talmudic law recognizes the accused's absolute privilege against self-incrimination in criminal cases.[14] In about the second century of the current era, the Mishnah[15] codified traditions dating back many centuries, including the privilege against self-incrimination.[16] Further, to convict a person of a criminal charge, the Book of Deuteronomy requires the testimony of at least two witnesses,[17] and the accused himself may not be one of those witnesses.[18]

While British Colonial governments in America constitutionally pro-

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from Detective Richard Norwig of the Moorhead (Minnesota) Police Department stating that Minnesota "wanted a hold on Jeremy").

10. *See id.* at 306 (noting that his North Dakota incarceration was for charges unrelated to this appeal).

11. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be witness against himself.").

12. 384 U.S. 436 (1966).

13. *See Tibiatowski*, 590 N.W.2d at 307 (reporting that, throughout their interview, Wheeler failed to give Tibiatowski a *Miranda* warning, although she suggested that he talk to an attorney after he confessed to his participation in a convenience store robbery).

14. *See* Rosenberg & Rosenberg, *supra* note 3, at 956 (observing that Talmudic law barred the accused's confessions in most criminal and quasi-criminal cases in or out of court, regardless of whether the confession was compelled or voluntary).

15. *See id.* at 968 n.48 (explaining that the word Mishnah stems from a verb meaning "to repeat," suggesting oral tradition learned by repetition).

16. *See id.* at 967-68 (describing the Mishnah as a codification of basic Jewish law derived from Biblical text and orally transmitted law).

17. *See Deuteronomy* 19:15 (King James) ("One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.").

18. *See id.* The literal wording of *Deuteronomy* 19:15 still would seem to allow the accused to be one of the two required witnesses. *See id.* However, *Deuteronomy* 24:16 later states: "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin." *Id.* at 24:16. *See also* Rosenberg & Rosenberg, *supra* note 3, at 975-76. *Deuteronomy* 24:16 is interpreted to exclude testimony by relatives, and since a man is considered to be his own closest relative, these two *Deuteronomy* texts together provide the scriptural basis for the Talmudic rule against admitting a person's own confession in evidence against him. *See id.* at 976-77.

tected the privilege against imposed self-incrimination,[19] the privilege finds its roots in England as a rule of evidence.[20] The earliest documentation of the privilege against self-incrimination in England came during the Restoration period following the seventeenth-century Cromwellian period.[21] Religious and political independents, including Puritans and Quakers, claimed the privilege for their personal and religious convictions when questioned about their loyalty to the British king.[22] American colonists, many of whom left England seeking liberty of conscience and religion, included the privilege in their earliest colonial and state constitutions.[23]

Those colonists, in establishing their national governing document, purposefully included the Fifth Amendment in the Bill of Rights of the U.S. Constitution, guaranteeing that the accused cannot be compelled to give evidence against himself.[24] The U.S. Supreme Court also has held that the Fifth Amendment's Due Process Clause excludes using involuntary confessions against criminal defendants.[25]

In *Malloy v. Hogan*,[26] the Court first applied this Fifth Amendment right to the states through the Fourteenth Amendment.[27] In the prece-

19. *See generally* R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 763 n.1 (1935) (describing the history of the privilege against self-incrimination).

20. *See* Brown v. Walker, 161 U.S. 591, 596-97 (1896) (tracing the need for protections against self-accusation in England prior to the expulsion of the Stuarts from the British throne in 1688).

21. *See* R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 964-67 (1990) (noting that medieval canon law, dating to the early thirteenth century, supports the privilege).

22. *See* Leonard W. Levy, *Origins of the Fifth Amendment and Its Critics*, 19 CARDOZO L. REV. 821, 841-42 (1997) (noting that a Puritan, Adrian Scroop, and a Quaker, William Penn, claimed the privilege against incriminating themselves when questioned about their loyalty to the British crown).

23. *See generally* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (F. Thorpe ed., 1909).

24. *See* U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself."); *see also Brown*, 161 U.S. at 597 ("[T]he States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.").

25. *See* Fikes v. Alabama, 352 U.S. 191, 197-98 (1957) (holding that, in light of the accused's incarceration in isolation for a week of questioning, the obtained confessions were not voluntary and using them denied due process, notwithstanding the absence of physical brutality or long, continued interrogation).

26. 378 U.S. 1 (1964).

27. *See id.* at 6; *see also* U.S. CONST. amend. XIV, § 1:

dent-setting case of *Miranda v. Arizona*,[28] the Court set forth a series of clear rules regarding custodial questionings.[29] *Miranda* requires that, before custodial questioning, a law enforcement official must warn the person to be questioned (1) that he has the right to remain silent,[30] (2) that any statement he makes may be used in criminal proceedings against him,[31] (3) that he has the right to counsel,[32] and (4) that, if he cannot pay, counsel will be appointed for him.[33] The *Miranda* court emphasized that "when an individual is taken into custody or deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized."[34]

In re Gault[35] applied this privilege against self-incrimination to juvenile court proceedings, regardless of whether courts consider such proceedings "civil" or "criminal" in nature.[36] In *Fare v. Michael C.*,[37] the Court

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> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

28. 384 U.S. 436 (1966).

29. *See id.* at 467-73.

30. *See id.* at 467-69 ("[I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.").

31. *See id.* at 469 ("The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.").

32. *See id.* at 469-73 ("[W]e hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . .").

33. *See id.* at 473.

34. *Id.* at 478.

35. 387 U.S. 1 (1967).

36. *See id.* at 42-57.

> Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are "civil" and not "criminal," and therefore the privilege should not apply. It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person "shall be compelled in any criminal case to be a witness against himself." However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is involved, but upon the nature of the statement or admission and the exposure that it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.

Id. at 49.

37. 442 U.S. 707 (1979).

declared that the admissibility of a juvenile's self-incriminating statement into evidence must include an inquiry into whether the juvenile "knowingly and voluntarily decided to forego" the right to silence and to counsel.[38]

Research indicates that juveniles, to clearly benefit from *Miranda's* constitutional safeguards, may require a warning expressed in language they clearly comprehend.[39]

III. CASE DESCRIPTION

In January 1996, Jeremy Tibiatowski was seventeen years old and had a history of trouble with the law.[40] His troubles were about to take on constitutional proportions. He had been in the legal and physical custody of the North Dakota Department of Corrections Division of Juvenile Services (DJS) for about a year, but Tibiatowski had been "on the run" for most of that time.[41] Connie Wheeler was his DJS case manager and had spoken with him in that capacity about thirty times.[42] Tibiatowski apparently developed a relationship of trust with her.[43] Wheeler, however, was an employee of the North Dakota Department of Corrections.[44] She knew or should have known of the North Dakota laws governing her position. North Dakota law obligated her to cooperate with North Dakota authorities and authorities of other states by returning juveniles to another state's custody at that state's request.[45]

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38. *See id.* at 724-25 (citing *Miranda*, 384 U.S. at 475-77).

39. *See* Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1160 (1980). Many juveniles, even those 16 years old depending on their intelligence quotient scores, insufficiently comprehend constitutional protections against self-incrimination. *See id.* Juveniles should be made aware of these rights in language they can understand to assure that their statements are voluntary. *See id.* at 1161.

40. *See* State v. Tibiatowski, 590 N.W.2d 305, 307 (Minn. 1999); *see also* Brief for Respondent at 5-6, State v. Tibiatowski, 590 N.W.2d 305 (Minn. 1999) (No. C2-97-834) (alleging that Tibiatowski snatched a purse while on the run from the custody of the North Dakota Department of Corrections Division of Juvenile Services).

41. *See Tibiatowski*, 590 N.W.2d at 307; *see also* Brief for Respondent at 5-6, *Tibiatowski*, (No. C2-97-834) (noting that, in January 1996, Tibiatowski was in the custody of the North Dakota Department of Corrections for about a year and escaped in late January 1995 from the facility where he was placed).

42. *See Tibiatowski*, 590 N.W.2d at 307 (noting that Wheeler and Tibiatowski had conversed both in person and by telephone).

43. *See id.* (reporting that Wheeler had been Tibiatowski's case manager for a year; that at the omnibus hearing, Tibiatowski stated that he cooperated with Wheeler because he "wanted to be honest with her," and that he recognized that honesty with her was part of his "obligation as a person on probation").

44. *See id.* (identifying Wheeler as a North Dakota Department of Corrections DJS Human Relations Counselor).

45. *See* N.D. CENT. CODE § 27-21-09 (1991) (stating that the Division of Juve-

On January 31, 1996, two young men, one carrying a shotgun, robbed a Moorhead, Minnesota, Travel Mart convenience store.[46] A third accomplice drove the escape vehicle.[47] Three eyewitnesses to the robbery were unable to describe the gunman.[48]

On February 3, 1996, Tibiatowski was picked up on North Dakota charges unrelated to the January 31 robbery and placed in the Cass County (North Dakota) Juvenile Detention Center.[49] When Wheeler learned that Tibiatowski was in custody, she made an appointment to see him at the detention center late on the afternoon of February 13.[50] She informed Tibiatowski that their conversation would include discussion of his whereabouts and activities while on the run.[51]

By coincidence, Moorhead Police Detective Richard Norwig interviewed two suspects early in the day of February 13 in connection with the Moorhead convenience store robbery.[52] The two suspects identified the gunman as "Jeremy" or "Bud," but were unable to provide his last name or other positive identification.[53] After Norwig completed questioning the robbery suspects, he called Wheeler and left a message that Minnesota authorities wanted a hold on Tibiatowski.[54] At that time, Norwig knew only that the alleged gunman's name might be "Jeremy" or "Bud."[55]

When Wheeler received Norwig's message, she reasonably suspected Tibiatowski had been involved in something criminal recently in Minnesota.[56] She knew about the convenience store robbery but reportedly did

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nile Services is to cooperate with the North Dakota juvenile courts); *see id.* § 27-22-01 (stating that North Dakota's policy is to cooperate fully with other states in returning juveniles to another state whenever such return is sought); *see id.* § 27-22-02 (stating that under the Interstate Compact on Juveniles, a delinquent juvenile may be sent to another state for custody, upon the other state's request).

46. *See Tibiatowski*, 590 N.W.2d at 306 (reporting that the gunman, while demanding money, pumped the gun as if chambering a round of ammunition).

47. *See id.* at 307 (noting that the driver of the escape vehicle was the only adult involved in the crime; Tibiatowski and the other accomplice were juveniles).

48. *See id.* at 306 (reporting that eyewitnesses provided only a general description of the robbers); *see also* Brief for Respondent at 7, State v. Tibiatowski, 1999 WL 110847 (Minn. Mar. 4, 1999) (No. C2-97-834) (noting that the only description of the gunman was by his height and that an eyewitness failed to identify Tibiatowski in a photo lineup).

49. *See Tibiatowski*, 590 N.W.2d at 307.

50. *See id.*

51. *See id.* (noting that Wheeler also intended to discuss an upcoming hearing and Tibiatowski's placement for a previous offense).

52. *See id.* (reporting that Moorhead, Minnesota, law enforcement authorities learned on February 11, 1996, that two other suspects could have been involved in the Travel Mart robbery).

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

not connect Tibiatowski with that crime.[57] She knew or should have known that if she obtained information from Tibiatowski implicating him in any illegal activities, North Dakota laws obligated her to convey that information to appropriate law enforcement authorities.[58] Once she received Norwig's message, she also knew or should have known that North Dakota's Interstate Compact on Juveniles[59] and North Dakota's official policy of cooperation with other states[60] operated to place an additional restraint on Tibiatowski's freedom. Before Wheeler saw Tibiatowski for their February 13 afternoon meeting, she already was obligated to honor Norwig's request for a hold on Tibiatowski and to deliver Tibiatowski to Minnesota authorities.

During their meeting, Wheeler failed to inform Tibiatowski that Minnesota police had contacted her and wanted to question him.[61] She failed to tell him that he now was under additional restraint from Minnesota authorities.[62] She failed to advise him of his constitutional rights under *Miranda*.[63] Wheeler recognized that Tibiatowski seemed quieter than usual and bothered by something.[64] When she asked, well into their conversation, if he wanted to tell her anything, he blurted out his involvement in the January 31 robbery.[65] Tibiatowski then began asking Wheeler about his "legal status."[66] Only after she obtained his confession did Wheeler advise Tibiatowski to talk to a lawyer.[67]

The next day, Wheeler reported Tibiatowski's incriminating statement to Norwig,[68] as she was obligated to do under North Dakota law.[69] Tibiatowski's additional restraint resulted in his transfer to Minnesota

57. *See id.*

58. *See* N.D. CENT. CODE §§ 27-21-09, 27-22-01 (1991).

59. *See id.* § at 27-22-01 (permitting North Dakota authorities to send a delinquent juvenile to another state for custody upon the other state's request).

60. *See id.* § at 27-21-09.

61. *See* Brief for Respondent at 6, State v. Tibiatowski, 1999 WL 110847 (Minn. Mar. 4, 1999) (No. C2-97-834).

62. *See id.*

63. *See Tibiatowski*, 590 N.W.2d at 307.

64. *See id.*

65. *See id.* (noting Wheeler's shock at Tibiatowski's confession and her surprise at his use of a gun, which previously had not been part of his background).

66. *See id.; see also* Brief for Respondent at 7, *Tibiatowski* (No. C2-97-834) ("Jeremy asked Officer Wheeler what was going to happen to him.").

67. *See Tibiatowski*, 590 N.W.2d at 307 ("[W]hen respondent started asking questions about his legal status, she told him that he needed to talk to an attorney."). Even though Wheeler advised Tibiatowski to consult a lawyer when she realized that he was incriminating himself, she still failed to apprise him of his *Miranda* rights and at no time during the interview did she instruct him of his privilege against self-incrimination. *See id.*

68. *See id.*

69. *See* N.D. CENT. CODE § 27-22-01 to -02 (1991).

authorities.[70] Without Tibiatowski's statement, little evidence connected him to the robbery or identified him as the gunman.[71] Three eyewitnesses failed to describe the gunman in any detail.[72] One eyewitness failed to identify Tibiatowski even when shown a photo lineup including his picture.[73] The two suspects that Norwig questioned identified Tibiatowski only after learning of his incriminating statement.[74]

Tibiatowski was certified to stand trial in Minnesota as an adult on the charge of first-degree aggravated robbery.[75] At the omnibus hearing, Judge Michael L. Kirk admitted Tibiatowski's statement to Wheeler into evidence.[76] Tibiatowski waived his right to a jury trial and Judge Kirk adjudged him guilty.[77] The Minnesota Court of Appeals reversed, finding Tibiatowski's statement inadmissible absent a valid *Miranda* warning.[78] The Minnesota Supreme Court reversed the court of appeals, reinstating the trial court ruling.[79] Tibiatowski's sentence was fifty-eight months in prison.[80]

IV. ANALYSIS

The Minnesota Supreme Court considered three issues in *Tibiatowski*:[81]

1. When Wheeler questioned Tibiatowski at the North Dakota Juvenile Detention Center, was he under an additional custodial restraint, other than that relating to his previous charge?[82]
2. Was Wheeler's questioning of Tibiatowski express questioning

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70. *See Tibiatowski*, 590 N.W.2d at 307 (confirming that the next day Norwig received Tibiatowski's confession and custody of Tibiatowski).

71. *See id.*

72. *See id.* at 306 ("None of the eyewitnesses were [sic] able to give more than a general description of the robbers."); *see also* Brief for Respondent at 7, State v. Tibiatowski, 1999 WL 110847 (Minn. Mar. 4, 1999) (No. C2-97-834) ("None of the three eyewitnesses to the robbery could give a more detailed description.").

73. *See Tibiatowski*, 590 N.W.2d at 306; see also Brief for Respondent at 7, Tibiatowski (No. C2-97-834).

74. *See Tibiatowski*, 590 N.W.2d at 307.

75. *See id.* (citing MINN. STAT. § 609.245, subd. 1 (1998)).

76. *See id.* at 307-08; *see also* State v. Tibiatowski, No. C2-97-834, 1999 WL 110847, at *1 (Minn. Ct. App. Feb. 24, 1998), *rev'd* 590 N.W.2d 305 (Minn. 1999).

77. *See Tibiatowski*, 590 N.W.2d at 308; *see also* Brief for Respondent at 4, *Tibiatowski* (No. C2-97-834).

78. *See Tibiatowski*, 1999 WL 110847 at *2-3.

79. *See Tibiatowski*, 590 N.W.2d at 311.

80. *See id.* at 308 (following Tibiatowski's guilty plea, he received the presumptive sentence); *see also Tibiatowski*, 1999 WL 110847, at *4 (documenting his sentence as the Minnesota Sentencing Guidelines' presumptive 58-month prison term).

81. *See Tibiatowski*, 590 N.W.2d at 308-11.

82. *See id.* at 308-09.

reasonably likely to elicit an incriminating response and was his response voluntary?[83]

3. What was Wheeler's official capacity at the time she questioned Tibiatowski?[84]

A. *Additional Custodial Restraint*

As decided by *Miranda*, the Fifth Amendment protects persons from being compelled to incriminate themselves in interrogations in which their freedom of action is curtailed in any significant way.[85] The *Tibiatowski* court held that there was "no evidence of restraint on the suspect's freedom other than that to which the suspect was already subject by reason of his custody for an unrelated offense . . . ."[86] This holding is unsupported by the evidence.

1. *Court Analysis of "Additional Restraint"*

Although the parties stipulated that Tibiatowski was in custody, the Minnesota Supreme Court correctly noted that both lower courts failed to consider whether the circumstances of his custody included an additional restraint requiring a *Miranda* warning from Wheeler.[87]

The *Tibiatowski* court analyzed the facts in light of the "additional restraint" tests set forth in *Cervantes v. Walker*,[88] *Leviston v. Black*[89] and *Garcia v. Singletary*.[90]

Under *Cervantes*, a *Miranda* warning is required when custodial interrogation significantly deprives the suspect of freedom of action or places an additional imposition on freedom of movement.[91] Cervantes was a

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83. *See id.* at 309-10.

84. *See id.* at 310-11.

85. *See* Miranda v. Arizona, 384 U.S. 436, 477 (1966). "The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while . . . deprived of his freedom of action in any significant way." *Id.* "[W]hen an individual is . . . deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." *Id.* at 478. "[T]he Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself." *Id.* at 479.

86. *Tibiatowski*, 590 N.W.2d at 309.

87. *See id.* at 308.

88. 589 F.2d 424, 428 (9th Cir. 1978).

89. 843 F.2d 302, 304 (8th Cir. 1988).

90. 13 F.3d 1487, 1492 (11th Cir. 1994).

91. *See Cervantes*, 589 F.2d at 428 ("Thus, restriction is a relative concept, one not determined exclusively by lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.").

prison inmate who was moving to a different cell.[92] The discovery of a green odorless substance among Cervantes' possessions sparked a deputy sheriff's questioning of him.[93] Cervantes readily identified the substance as marijuana.[94] Cervantes was under no additional restriction other than that posed by his incarceration for a previous offense.[95] The *Cervantes* court ruled that no *Miranda* warning was required because such questioning merely enabled the officer to determine whether a crime had been committed or was in progress.[96]

Under *Leviston*, "additional restraint" is evidenced by some further restriction on the suspect's freedom of action.[97] Leviston was incarcerated on previous charges when he initiated a police interview.[98] During the interview, Leviston attempted to cast suspicion on two innocent acquaintances for a robbery that Leviston had committed but for which he was not incarcerated.[99] When later confronted with evidence of the falseness of his accusations, Leviston made an incriminating statement.[100] Only then did Leviston receive a *Miranda* warning.[101] The false accusation and

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92. *See id.* at 426-27.

93. *See id.* at 427.

94. *See id.* ("Jopes opened the matchbox, showed the contents to Cervantes and asked 'What's this?' Cervantes replied, 'That's grass, man.'").

95. *See id.*

96. *See id.* (citing Lowe v. U.S., 407 F.2d 1391, 1393-94 (9th Cir. 1969)).

97. *See* Leviston v. Black, 843 F.2d 302, 304 (8th Cir. 1988) (explaining that this restriction of an interogee's freedom of action must be in connection with the interrogation itself).

98. *See id.* at 303 ("Leviston's convictions stem from [a bank] robbery. . . . Approximately one month after the robbery, Leviston was incarcerated . . . due to an unrelated misdemeanor conviction. . . . During that time, Officer . . . Infantino . . . was told by his commanding officer . . . that Leviston had . . . asked to speak with [the police] about the robbery.").

99. *See id.* ("Infantino . . . met with Leviston [and] Leviston [implicated two innocent acquaintances]"); *see also supra* note 98 and accompanying text.

100. *See Leviston*, 843 F.2d at 303.

> About two weeks later, Infantino . . . told Leviston that his story had not panned out. Witnesses at the bank did not identify [the innocent acquaintances accused by Leviston], and bank photographs of the robber somewhat resembled Leviston. Infantino said he felt someone was unjustifiably trying to implicate Leviston or that Leviston himself may have been involved to some degree in the robbery. Leviston then interrupted, saying, "I'm not going to say I did it, and I'm not going to say I didn't do it. Nobody's going to lay anything off on Baby Ric." Due to the potentially incriminating nature of this statement, and the fact that the name "Baby Ric" had come up in Infantino's investigation of the robbery, Infantino then gave Leviston *Miranda* warnings.

Id.

101. *See id.*

the incriminating statement were introduced at trial.[102]

The *Leviston* court ruled that no *Miranda* warning was required because, before the false accusation and the incriminating statement, Leviston had not been taken into custody or otherwise deprived of his freedom of action in any significant way that was additional to his existing imprisonment.[103] Leviston, like Cervantes, was not under additional constraint, other than that imposed by his imprisonment for an earlier offense at the time Leviston requested to speak with police.[104] Although Leviston was not free to leave the prison, he was free to end his conversation with police at any time and was allowed to leave the interview at his own request.[105]

Under *Garcia*, "additional restraint" must be shown by an added imposition on the suspect's freedom of movement or an additional restriction on his liberty.[106] Garcia was in jail for a previous offense when a deputy observed smoke and flames coming from Garcia's cell.[107] The deputy extinguished the flames and asked why Garcia set the fire.[108] Garcia said, "I no get my canteen. . . . I got my rights."[109] The court found that before the deputy queried Garcia about the fire, the deputy did not deprive Garcia of his freedom of action in any way.[110] Garcia's only restriction was that imposed by his incarceration for a previous offense.[111] The district court admitted into evidence Garcia's inculpatory statements absent a *Miranda* warning,[112] leading to his first-degree arson conviction.[113] The *Garcia* court ruled that *Miranda* warnings were not required because the spontaneous question, although accusatorial in tone, did not constitute an interrogation.[114] The *Garcia* court noted that factual questioning, such as general on-the-scene questioning of facts and circumstances surrounding

102. *See id.*
103. *See id.* at 304.
104. *See id.* at 303.
105. *See id.* at 304 (finding, at the district court level, that Leviston could end the conversations at will because he had initiated the police inquiry).
106. *See* Garcia v. Singletary, 13 F.3d 1487, 1492 (11th Cir. 1994) ("To determine whether prison officials have applied an additional restraint, further restricting an inmate's freedom and triggering *Miranda* warnings, courts must consider the totality of the circumstances surrounding the alleged interrogation.").
107. *See id.* at 1488-89 (reporting that the deputy entered Garcia's cell, saw a flaming sheet draped over the sink and saw Garcia adding mattress stuffing to the fire).
108. *See id.* at 1489.
109. *Id.*
110. *See id.* at 1492.
111. *See id.*
112. *See id.* at 1489.
113. *See id.* (noting that the state's case heavily relied on Garcia's statements).
114. *See id.* at 1491-92 (noting that the deputy's question was a spontaneous reaction to a startling event, that the deputy was charged with ensuring inmate safety and that the deputy did not threaten Garcia or force him to answer).

a crime, does not necessitate a *Miranda* warning.[115]

These cases are readily distinguishable from *Tibiatowski.* Unlike the situations in *Cervantes* and *Garcia,* Wheeler's questioning of Tibiatowski did not occur upon discovering evidence of a crime;[116] the interview with Wheeler took place two weeks after the crime.[117] Wheeler's meeting with Tibiatowski was to discuss his general whereabouts and activities while on the run, not to discuss a specific event that had just taken place.[118] Also, unlike the facts in *Garcia,* Wheeler's question to Tibiatowski was not spontaneous. She asked the question after engaging him in lengthy discussion and noticing that Tibiatowski seemed bothered and quieter than usual.[119]

In the *Leviston* case, Leviston initiated the interrogation.[120] Tibiatowski did not initiate an interrogation. In addition, unlike each of these three cases, Tibiatowski was under an additional restraint. The *Tibiatowski* court held that there was no evidence of restraint on Tibiatowski's freedom other than that to which he already was subject by reason of his custody for a prior unrelated offense.[121] Under North Dakota law, however, Wheeler was to cooperate in sending a delinquent juvenile to another state for custody upon the other state's request.[122] Norwig's request on behalf of Minnesota to hold Tibiatowski and transport him to Minnesota for questioning[123] provided the basis for the additional restraint on Tibiatowski's freedom to his restraint for previous North Dakota charges.[124] Therefore, Wheeler was obligated to give Tibiatowski a *Miranda* warning.

2. *Additional Support for Additional Restraint*

Other relevant U.S. Supreme Court law confirms that "additional restraint" must be viewed objectively to give proper force to the Fifth

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115. *See id.* at 1489 (citing Miranda v. Arizona, 384 U.S. 436, 477-78 (1966)).

116. *See* State v. Tibiatowski, 590 N.W.2d 305, 307 (Minn. 1999) (stating that Wheeler's questioning of Tibiatowski took place at a North Dakota juvenile detention center).

117. *See id.* at 306-07 (stating that the convenience store robbery took place on January 31, 1996, and the questioning took place on February 13, 1996).

118. *See id.* at 307.

119. *See id.*

120. *See* Leviston v. Black, 843 F.2d 302, 303 (8th Cir. 1988).

121. *See Tibiatowski,* 590 N.W.2d at 309.

122. *See* N.D. CENT. CODE § 27-22-01 (1991) (stating that North Dakota's policy is to cooperate fully with other states in returning juveniles to another state whenever such return is sought); *see id.* at § 27-22-02 (stating that under the Interstate Compact on Juveniles, a delinquent juvenile may be sent to another state for custody, upon the other state's request).

123. *See Tibiatowski,* 590 N.W.2d at 307.

124. *See id.* at 306 (noting that Tibiatowski already was incarcerated in the Cass County Juvenile Detention Center in Fargo, North Dakota, on charges unrelated to the convenience store robbery).

Amendment guarantees of *Miranda*.[125] In *Mathis v. U.S.*,[126] the Court emphasized, "[w]e find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody."[127] In *Orozco v. Texas*,[128] the Court stressed, "[f]rom the moment he gave his name, according to the testimony of one of the officers, petitioner was not free to go where he pleased . . . ."[129] In *Oregon v. Mathiason*,[130] the Court found that the defendant's statement was made voluntarily without a *Miranda* warning.[131] However, the *Mathiason* facts show that the suspect volunteered to be questioned,[132] was told he was not in custody[133] and freely left after his interview.[134]

Mathis, *Orozco* and *Mathiason* support the assertion that Tibiatowski objectively was under "additional restraint" and entitled to a *Miranda* warning. Tibiatowski was in fact "on hold" for Minnesota, similar to the custody-in-fact situation in *Mathis*. Like Orozco, Tibiatowski was not free to go where he pleased from the moment Wheeler received Norwig's message. Unlike Mathiason, Tibiatowski did not and could not freely leave after Wheeler's interview. By operation of North Dakota's laws, Tibiatowski already was under "additional restraint" from the state of Minnesota before the Wheeler-Tibiatowski interview.[135] Wheeler should have issued a *Miranda* warning because Tibiatowski was under an additional restraint.

3. Interogee's Awareness of Additional Restraint

Cervantes,[136] *Leviston*[137] and *Garcia*[138] all require that the interogee be

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125. *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977); Orozco v. Texas, 394 U.S. 324, 325 (1969); Mathis v. U.S., 391 U.S. 1, 4-5 (1968).

126. 391 U.S. 1 (1968).

127. *Id.* at 4-5.

128. 394 U.S. 324 (1969).

129. *Id.* at 325.

> [O]fficers questioned petitioner about incriminating facts [regarding a murder in which he was a prime suspect] without first informing him of his right to remain silent, his right to have the advice of a lawyer before making any statement, and his right to have a lawyer appointed to assist him if he could not afford to hire one.

Id. at 326.

130. 429 U.S. 492 (1977).

131. *See id.* at 495.

132. *See id.*

133. *See id.*

134. *See id.*

135. *See* N.D. CENT. CODE § 27-22-01 (1991).

136. 589 F.2d 424, 428 (1978) (stating that the analysis required is "whether a reasonable person would believe there had been a restriction of his freedom over

aware of any "additional restraint." In *Berkemer v. McCarty*,[139] the U.S. Supreme Court elaborated on the determination of an interogee's awareness of an "additional restraint."[140] According to *Berkemer*, awareness is viewed from the standpoint of a reasonable person in the interogee's position.[141] In that case, an officer observed Berkemer's car weaving on a highway and stopped him.[142] Berkemer failed a field sobriety test and admitted recent beer consumption and marijuana use.[143] The officer then formally arrested Berkemer.[144] The officer admitted that he decided to arrest Berkemer and charge him with a traffic offense as soon as Berkemer stepped out of the car.[145] Berkemer unsuccessfully sought exclusion of his admission of alcohol and drug use because the officer did not warn him of his Fifth Amendment rights.[146] In ruling Berkemer's statement admissible, the Court stated:

> Although [the arresting officer] apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, [the officer] never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.[147]

The "additional restraint" to which Tibiatowski was subject during his interview with Wheeler was no "unarticulated plan," as in *Berkemer*. Berkemer had reason to believe his arrest was imminent. Tibiatowski had

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and above that in his normal prisoner setting").

137. 843 F.2d 302, 304 (8th Cir. 1988) (stating that "[t]he relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody").

138. 13 F.3d 1487, 1490 (11th Cir. 1994) (considering "whether the prison officials' conduct would cause 'a reasonable person to believe his freedom of movement had been further diminished'") (quoting *Cervantes*, 589 F.2d at 429).

139. 468 U.S. 420 (1984).

140. *See id.* at 440-42.

141. *See id.* at 442.

142. *See id.* at 423.

143. *See id.*

144. *See id.* at 423-24 (noting that the officer transported Berkemer to jail where he again admitted recent alcohol and drug use).

145. *See id.* at 423 ("At that point, 'Williams concluded that [Berkemer] would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated.' However, [Berkemer] was not told that he would be taken into custody.").

146. *See id.* at 424.

147. *Id.* at 442.

no reason for such a belief. He did not know of Minnesota's hold on him. He met with Wheeler, his North Dakota case manager, in North Dakota regarding a North Dakota charge unrelated to the Minnesota Travel Mart robbery. Therefore, the *Berkemer* analysis does not apply to *Tibiatowski.*

B. Likelihood of Incrimination on Express Questioning and Voluntariness

On the second issue in *Tibiatowski,*[148] the Minnesota Supreme Court analyzed *Rhode Island v. Innis*[149] and *Arizona v. Mauro*[150] to determine whether Wheeler's questioning was express questioning reasonably likely to elicit an incriminating response.

To consider the voluntariness of Tibiatowski's statement, the court relied on a totality-of-the-circumstances test referenced in a number of Minnesota Supreme Court decisions.[151]

1. Likelihood of Incrimination

The *Innis* court viewed the likelihood of incrimination under interrogation as based on whether an interrogator should have known that the questions were reasonably likely to elicit an incriminating response from an interogee.[152] Two police officers, conversing audibly within Innis' company, discussed the harm that might come to handicapped children in the area if the children found a searched-for gun.[153] Innis then offered to lead police to the hidden weapon.[154] Thus, Innis' supposed "interrogation" comprised merely remarks between police officers in Innis' presence—remarks that were not even directed at Innis.[155] The *Innis* court found no likelihood that the suspect would incriminate himself during

148. *See supra* note 83 and accompanying text.

149. 446 U.S. 291 (1980). "We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent . . . that the police should know [is] reasonably likely to elicit an incriminating response from the suspect." *Id.* at 300-01.

150. 481 U.S. 520 (1987). "[I]nterrogation includes a practice—whether actual questioning or 'its function equivalent'—that the police know is reasonably likely to elicit an incriminating response from a suspect." *Id.* (citing *Innis,* 446 U.S. at 292).

151. *See* State v. Jones, 566 N.W.2d 317, 322-23 (Minn. 1997); State v. Hince, 540 N.W.2d 820, 824 (Minn. 1995); State v. Thaggard, 527 N.W.2d 804, 808 (Minn. 1995); State v. Pilcher 472 N.W.2d 327, 333 (Minn. 1991); State v. Hale, 453 N.W.2d 704, 707 (Minn. 1990); State v. Jackson, 351 N.W.2d 352, 355 (Minn. 1984).

152. *See Innis,* 446 U.S. at 292 (defining interrogation under *Miranda* as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect").

153. *See id.* at 291.

154. *See id.* at 295.

155. *See id.* at 294-95.

the police conversation because police directed no express questions to Innis.[156] Also, Innis was well aware of his privilege against self-incrimination because he had been told repeatedly of his *Miranda* rights and waived them before revealing the gun's location to police.[157] The *Innis* Court concluded that no questioning occurred which was likely to elicit an incriminating response.[158]

In *Arizona v. Mauro*,[159] the defendant, like Innis, was well-advised of his *Miranda* rights while in custody and before he made any incriminating statements.[160] Mauro's "interrogation" was a conversation, tape-recorded with Mauro's consent, between himself and his wife in a police officer's presence.[161] During the Mauros' conversation, his wife agonized over the recent killing of their son, with which Mauro was charged.[162] Although the tape recording did not document a specific incriminating statement by Mauro, the prosecution used the tape to rebut Mauro's insanity defense.[163] Like the *Innis* court, the *Mauro* court found that Mauro was informed of his *Miranda* rights before the recording and knowingly waived those rights.[164]

The *Tibiatowski* court's reliance on *Innis* and *Mauro* is misplaced. With *Innis* and *Mauro* as its guide, the *Tibiatowski* court found that express questions are not necessarily interrogation[165] and that Wheeler's "subtle compulsion" was not enough to trigger a *Miranda* warning.[166]

However, Wheeler should have known that her question was rea-

156. *See id.* at 292.

157. *See id.* at 294-95 (noting that the trial court ruled that Innis waived his *Miranda* rights, that the arresting patrolman advised him of his rights, that two other police officers who arrived at the arrest scene, in turn, subsequently twice again advised him of his rights, and he was again advised of his rights after a weapon search).

158. *See id.* at 291 (holding that Innis was not interrogated in violation of his privilege against self-incrimination under *Miranda*).

159. 481 U.S. 520 (1987).

160. *See id.* at 521-22. Mauro was advised of his Fifth Amendment self-incrimination privilege pursuant to *Miranda* when arrested for the admitted murder of his son. *See id.* He was warned again when he was taken to a police station. *See id.* at 522. At that point he stated he wanted a lawyer to be present before making any more statements. *See id.*

161. *See id.* at 522 (recounting that Mauro and his wife were told that their conversation with each other must be within the observation and hearing of a police officer, that the recording was made with the knowledge of both spouses and that no police officer made any comments throughout the couple's conversation).

162. *See id.* at 522 n.1.

163. *See id.* at 523.

164. *See id.* at 527-30 (finding that Mauro voluntarily agreed to the tape recording of his conversation with his wife in the presence of a police officer and that the Fifth Amendment did not prohibit the use of statements from that conversation at his trial).

165. *See* State v. Tibiatowski, 590 N.W.2d 305, 309 (Minn. 1999)

166. *See id.* at 310.

sonably likely to elicit an incriminating response from Tibiatowski. Wheeler's question was not a casual remark within Tibiatowski's hearing; it was express and addressed directly to him.[167] She also knew that Minnesota authorities wanted a hold placed on him.[168] Yet Wheeler never warned Tibiatowski to be mindful of the privilege against self-incrimination during their interview.[169] Tibiatowski had no opportunity to make an informed waiver because he was not advised of his rights. An interogee unaware of his *Miranda* rights is less likely to use the privilege against self-incrimination when directly questioned.[170] Therefore, *Innis* and *Mauro* cannot support the *Tibiatowski* court's decision.

2. *Voluntariness*

Once the *Tibiatowski* court determined that Wheeler's question was not likely to elicit an incriminating response, it considered whether Tibiatowski's statement was voluntary.[171] The *Tibiatowski* court stated that Minnesota determines voluntariness through a totality-of-the-circumstances test (totality test).[172] This test requires that the court weigh such factors as the interogee's age, maturity, intelligence, education and prior criminal experience, as well as the adequacy or lack of a *Miranda* warning.[173] The totality test for juveniles, however, has been questioned.[174]

Even accepting the Minnesota court's reliance on the totality test, it failed to analyze factors on the record which would justify its conclusion that Tibiatowski's situation met the test.[175] The court's decision particu-

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167. *See id.* (stating that only Tibiatowski and Wheeler were present during the interview, that she noted he seemed "bothered" and quieter than usual, and that she asked him directly "if there was anything he wanted to tell" her).

168. *See id.* at 307.

169. *See id.* (observing that Wheeler did not give Tibiatowski a formal *Miranda* warning, even after he blurted out his incriminating statement and questioned his legal status).

170. *See* Miranda v. Arizona, 384 U.S. 436, 458 (1966) (noting that a defendant cannot make a statement by his own free choice unless he has been apprised of the Constitutional privilege against self-incrimination).

171. *See Tibiatowski*, 590 N.W.2d at 310.

172. *See id.* ("Minnesota applies federal constitutional standards through a totality-of-the-circumstances test to determine the voluntariness of a suspect's statement.").

173. *See* State v. Jones, 566 N.W.2d 317, 322-23 (Minn. 1997); State v. Hince, 540 N.W.2d 820, 824 (Minn. 1995); State v. Thaggard, 527 N.W.2d 804, 808 (Minn. 1995); State v. Pilcher 472 N.W.2d 327, 333 (Minn. 1991).

174. A 1995 study of police interrogations of juveniles assessed the workability of the totality test. *See* Lawrence Schlamm, *Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. TOL. L. REV. 901 (1995). The study questioned the reliability of the totality test for failing to establish clear guidelines for police interrogation of juveniles and allowing undue judicial discretion. *See id.* at 912-14.

175. *See Tibiatowski*, 590 N.W.2d at 307.

larly fails to consider the lack of a *Miranda* warning, which would have allowed Tibiatowski to knowingly decide whether to waive those rights.[176] Like the weavers of invisible cloth in *The Emperor's New Clothes*,[177] the *Tibiatowski* court attempted to create support for an argument that fails. That is, the court proffers a totality-of-the-circumstances analysis woven with invisible thread.

Also absent is consideration of the totality test in light of the U.S. Supreme Court decision, *Fare v. Michael C.*[178] The *Michael C.* Court applied a totality test to the voluntariness of a juvenile's statement.[179] A crucial issue considered by the *Michael C.* Court in applying the totality test was whether Michael C. understood and voluntarily waived his rights before questioning:

> Thus, the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain *whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel.*[180] . . . *The totality approach permits—indeed, it mandates—inquiry into* all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into *whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.*[181]

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176. *See id.*

177. HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (visited Sept. 18, 1999) <http://www.geocites.com/Athens/2424/clothes.html>. Scoundrels bilk a clothes-conscious king by "weaving" a non-existent cloth, supposedly invisible to the ignorant and incompetent. *See id.* A young child who "could only see things as his eyes showed them to him" publicly announced the king's nakedness. *See id.*

178. 442 U.S. 707 (1979).

179. *See id.* at 725.

> This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.

Id.

180. *Id.* at 724-25 (citing Miranda v. Arizona, 384 U.S. 436, 475-77 (1966) (emphasis added)).

181. *Id.* at 724 (citing North Carolina v. Butler, 441 U.S. 369, 373 (1979)) (emphasis added).

The *Michael C.* Court found that the interrogating officers ensured that the suspect understood all of his *Miranda* rights and that the suspect willingly waived those rights.[182] Under this analysis, Tibiatowski's statement was not voluntary because he was not informed of his *Miranda* rights and thereby accorded the opportunity to voluntarily waive them. His statement should have been excluded.

Based on an analysis of Tibiatowski's facts under *Innis* and *Mauro*, Tibiatowski was entitled to a *Miranda* warning because Wheeler's express questioning of Tibiatowski was likely to elicit an incriminating response. Further, because Tibiatowski was not informed of his *Miranda* rights, he did not make a voluntary statement.

C. *Wheeler's Official Capacity*

On the third issue that the Minnesota Supreme Court considered in *Tibiatowski*,[183] the court erred in determining that Wheeler was not a law enforcement officer at the time she questioned Tibiatowski.[184] The *Tibiatowski* court stated: "Wheeler did not visit respondent as an agent for or at the request of the Moorhead [Minnesota] police as respondent contends. The meeting between respondent and Wheeler had been scheduled well before the Moorhead police phoned Wheeler about their interest in respondent . . . ."[185]

However, by operation of North Dakota law, Wheeler was acting on behalf of Minnesota authorities, not when she made the appointment to meet Tibiatowski, but as soon as she received Norwig's request for a hold on Tibiatowski.[186]

The *Tibiatowski* court decided Wheeler's official capacity without considering the following U.S. Supreme Court decision, *Estelle v. Smith*.[187] In *Estelle*, the Court looked beyond the formal title of "law enforcement officer" to whether the interrogator used the power of the state to elicit an incriminating response.[188] Smith, accused of murder, underwent a court-ordered pre-trial psychiatric exam to determine his competency to stand

182. *See Michael C.*, 442 U.S. at 726.

183. *See supra* note 84 and accompanying text.

184. *See* State v. Tibiatowski, 590 N.W.2d 305, 311 (Minn. 1999).

185. *Id.* This case was not the first time that the Minnesota Supreme Court addressed this issue. *See* Minnesota v. Murphy, 324 N.W.2d 340 (Minn. 1982), *rev'd*, 465 U.S. 420 (1984). In the state case, the court found that a probation officer's questioning of a defendant was reasonably likely to elicit an incriminating response, and therefore required a *Miranda* warning. *See id.* at 343. The U.S. Supreme Court reversed the decision, focusing instead on the custodial setting and not the probation officer's status. *See Murphy*, 430 U.S. at 430.

186. *See supra* note 6 for a discussion of a North Dakota official's obligation to act on behalf of other states seeking juveniles for questioning.

187. 451 U.S. 454 (1981).

188. *See id.* at 456-60.

trial.[189] Before the exam, the psychiatrist, Dr. Grigson, failed to give Smith a *Miranda* warning.[190] Smith was convicted and, based only on Grigson's testimony that Smith was a "severe sociopath," was sentenced to death.[191] The *Estelle* court faulted Grigson and the prosecution for failing to give Smith a *Miranda* warning prior to the psychiatric exam.[192] Because Grigson used the power of the state to elicit an incriminating response, his failure to issue Smith a *Miranda* warning resulted in the exclusion of Grigson's testimony in Smith's resentencing.[193]

Wheeler did not initially arrange her visit with Tibiatowski so that she was functioning as an agent of the Minnesota police.[194] By the time she visited Tibiatowski, however, she was aware of Minnesota's additional restraint on Tibiatowski.[195] When Wheeler visited Tibiatowski, she was a *de facto* agent of North Dakota and Minnesota authorities. Wheeler, like Grigson, used the power of the state to elicit an incriminating response without advising the interogee of his privilege against self-incrimination. According to the *Estelle* analysis, Wheeler should have been considered an agent of North Dakota *and* Minnesota.[196] Under *Miranda*, then, Wheeler was obligated to warn Tibiatowski of his Fifth Amendment rights.

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189. *See id.* at 454 (stating that the examining psychiatrist confirmed Smith's competency to stand trial and assist in his own defense).

190. *See id.* at 460 (noting that, before the psychiatric exam, Smith received no advice concerning his right to silence).

191. *See id.* Dr. Grigson testified before the jury on direct examination: (a) that Smith "is a very severe sociopath;" (b) that "he will continue his previous behavior;" (c) that his sociopathic condition will "only get worse;" (d) that he has no "regard for another human being's property or for their life, regardless of who it may be;" (e) that "[t]here is no treatment, no medicine . . . that in any way at all modifies or changes this behavior;" (f) that he "is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so;" and (g) that he "has no remorse or sorrow for what he has done . . . ." *Id.* at 459-60. Dr. Grigson, whose testimony was based on information derived from his 90-minute "mental status examination" of Smith was the state's only witness at the sentencing hearing. *See id.* at 460 (citations omitted).

192. *See id.* at 461-63 ("[T]he State's attempt to establish respondent's future dangerousness by relying on the statements he made to Dr. Grigson similarly infringes Fifth Amendment values.").

193. *See id.* at 473 (vacating respondent's death sentence because respondent's Fifth Amendment rights were abridged when the state introduced Dr. Grigson's testimony at the penalty phase).

194. *See* State v. Tibiatowski, 590 N.W.2d 305, 307 (Minn. 1999) (noting that Wheeler arranged her visit with Tibiatowski before she heard from Norwig).

195. *See id.*

196. *See supra* note 6 for a discussion of a North Dakota official's obligation to act on behalf of other states seeking juveniles for questioning.

V. CONCLUSION

The essence of the Fifth Amendment privilege against self-incrimination is to require the state to independently produce evidence of the person's guilt, not to coerce the evidence from the accused person.[197] The privilege against self-incrimination is so vital to the individual, and the ease in reciting these rights so simple, that there is no reason for failing to give *Miranda* warnings to a juvenile custodial interogee.

When Wheeler questioned Tibiatowski, he was under an additional restraint. Furthermore, Wheeler was cloaked with the authority of the state and her questioning elicited an incriminating response from Tibiatowski. Wheeler should have given Tibiatowski a Fifth Amendment *Miranda* warning. Absent that warning, Tibiatowski's confession was involuntary and should have been excluded.

197. *See Estelle*, 451 U.S. at 462 (citing Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961)).